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## **EXECUTIVE SUMMARY**

Concerned that multi-line business line customers will have incentives to migrate from switched to special access services, and that the resulting loss of revenues will necessitate PICC increases for all remaining switched access customers, the Commission proposes a special access PICC. The Commission should not adopt this proposal.

Customers who rely on special access for high speed data communications do not view switched services as a substitute. Nonetheless, the proposal assumes that the combined effects of pricing disparity and high substitutability will result in a substantial migration to special access services. These assumptions lack record support and are inconsistent with previous Commission conclusions. The Commission should take no action before it has accumulated data on migration patterns and revenue impact, if any.

A special access PICC represents a significant departure from long-standing Commission objectives, including the goal of regulating "efficiently and unintrusively to the benefit of consumers." If the Commission believes that it must adopt the proposal, it should be applied only to those customers in the intended target group; those outside the group, such as customers with existing special access arrangements, should be exempted.

Ultimately, the proposal is unworkable. Purchases of special access capacity are not readily translatable into line equivalents. Competitive ramifications create further complications. Given that the purpose of levying the special access PICC is to discourage anticipated customer activity - migration - it constitutes a tax. As such, it is unconstitutional under Article I, Section 8 and should not be adopted.

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BEFORE THE  
**Federal Communications Commission**

*Comments of API  
June 26, 1997*

WASHINGTON, D.C. 20554

<b>In the Matter of</b>	)	
	)	
<b>Access Charge Reform</b>	)	<b>CC Docket No. 96-262</b>
	)	
<b>Price Cap Performance Review for Local Exchange Carriers</b>	)	<b>CC Docket No. 94-1</b>
	)	
<b>Transport Rate Structure and Pricing</b>	)	<b>CC Docket No. 91-213</b>
	)	
<b>End User Common Line Charges</b>	)	<b>CC Docket No. 95-72</b>
	)	

**To: The Commission**

**COMMENTS  
OF THE  
AMERICAN PETROLEUM INSTITUTE**

The American Petroleum Institute (API), by its undersigned attorneys, hereby respectfully submits these comments in response to the Further Notice of Proposed Rulemaking released by the Federal Communications Commission (the Commission) on May 16, 1997 in the above-captioned proceeding.<sup>1/</sup> API urges the Commission not to adopt its proposal to allow incumbent local exchange

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<sup>1/</sup> *Access Charge Reform*, CC Docket No. 96-262, Further Notice of Proposed Rulemaking, FCC 97-158 (rel. May 16, 1997) (hereinafter FNPRM).

carriers to impose a primary interexchange carrier charge (PICC) on special access lines. Alternatively, if the Commission adopts the proposal, it should exempt at least three categories of customers: (1) those with existing special access service arrangements; (2) customers who have not previously purchased telecommunications services at a given location; and (3) special access services used to support data communications requirements.

#### **I. PRELIMINARY STATEMENT**

API is a national trade association representing approximately 300 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing, and transportation of petroleum, petroleum products, and natural gas. Among its many activities, API acts on behalf of its members as spokesperson before federal and state regulatory agencies. The API Telecommunications Committee is one of the standing committees of the organization's Information Systems Committee. The Telecommunications Committee evaluates and develops responses to state and federal proposals affecting telecommunications facilities used in the oil and gas industries.

**II. THE PROPOSAL IS PREDICATED ON UNSUPPORTED ASSUMPTIONS THAT ARE CONTRARY TO PREVIOUS COMMISSION CONCLUSIONS**

The Commission proposes to allow incumbent local exchange companies to assess a PICC on special access lines to secure revenues for the common line revenue requirement. This proposal was apparently made on the basis of concerns over potential migration of certain businesses from switched access to special access services, attributable to increased multiline subscriber line charges (SLCs) and the imposition of the new PICC on switched access services. The Commission contends that these businesses would be motivated to migrate because, given its "recent changes to charges incurred by multi-line businesses, including the higher SLC and the new multi-line business PICC, it may be cost-effective for some multi-line business that are currently using switched access to purchase instead special access lines."<sup>2/</sup>

The Commission's stated rationale assumes, first, that special and switched access services are close, if not perfect, substitutes. Under the Commission's scenario, business customers are apparently indifferent as to the services: a price increase in one (switched access) will drive the customer to other

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<sup>2/</sup> *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket No. 96-262, CC Docket No. 94-1, CC Docket No. 91-213, CC Docket No. 95-72, First Report and Order, FCC 97-158 (rel. May 16, 1997) (hereinafter *Access Charge Reform Order*) at ¶ 103; FNPRM at ¶ 401.

(special access). The premise is incorrect. Special access services are used for high speed data communications such as Wide Area Network and high speed Internet Access communications, as well as high density voice requirements.<sup>3/</sup> Switched access service is not suitable for high speed data communications requirements. Second, the proposal assumes that the combined effects of pricing disparity and substitutability will result in a migration so substantial that it warrants the imposition of new charges on all customers of interstate special access services.

These implicit assumptions have no basis in the record and contravene previous Commission findings. The Commission has found that (1) the cross-elasticity of these services is limited and (2) the bulk of any migration between the services already has occurred. These two points were addressed specifically in a 1992 Order establishing expanded interconnection for special access services:

Although some cross-elasticity exists between special and switched access, we need not delay acting on special access expanded interconnection until we have completed the comprehensive proceeding advocated by some parties. There has

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<sup>3/</sup> Interstate switched access charges were designed for circuit-switched interexchange voice telephony. *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket No. 96-262, CC Docket No. 94-1, CC Docket No. 91-213, CC Docket No. 96-263, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, FCC 96-488 (rel. Dec. 24, 1996) (hereinafter *Access Charge Reform NPRM*) at ¶ 288.

been a significant pricing disparity between special and switched access for many years that . . . already has caused significant migration by large users. There is no credible showing in this record that significant additional migration will occur with the implementation of expanded interconnection for special access.<sup>4/</sup>

Similarly, there is nothing in the record demonstrating that significant additional migration will occur after the imposition of higher SLCs and new PICCs on multi-line business line customers. Moreover, given growing reliance on special access for high speed data communications, even less cross-elasticity between services exists today than in 1992. Until the Commission has accumulated data indicating that the higher SLCs and new PICCs on multi-line business lines are resulting in a significant migration to special access services, it is premature to depart from the Commission's "established practice."<sup>5/</sup>

### **III. THE PROPOSAL IS INCOMPATIBLE WITH BOTH LONG-STANDING COMMISSION OBJECTIVES AND THE POLICIES OF THE 1996 ACT**

The proposal to impose PICCs on special access lines cannot be reconciled with either the Commission's efforts to foster a competitive market in special

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<sup>4/</sup> *Expanded Interconnection with Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Docket No. 91-141; CC Docket No. 92-222, Report and Order and Notice of Proposed Rulemaking, FCC 92-440 (rel. Oct. 19, 1992) at ¶ 26.

<sup>5/</sup> FNPRM at ¶ 404.



access services or the pro-competitive, deregulatory policies of the Telecommunications Act of 1996 (the 1996 Act).

In advancing the special access PICC proposal, the Commission implicitly concedes the dominance of the incumbent LECs in the various markets in which they operate. Until these markets are fully competitive, regulatory pricing decisions based on criteria other than cost will lead to marketplace distortions. In this instance, allowing incumbent LECs to assess a PICC on special access lines represents a substantial departure from cost-based pricing, minimizes efficiency incentives for incumbent LECs, and establishes a higher price umbrella for competing providers of special access services - all at the expense of end users.<sup>6/</sup> These results are at odds with the Commission's long-standing "objectives of promoting competition, encouraging market-based pricing, encouraging efficiency and permitting [the Commission] to regulate efficiently and unintrusively *to the benefit of consumers.*"<sup>7/</sup>

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<sup>6/</sup> It also appears to discourage efficient use of the network. One of the more vigorously debated claims of late is the LECs' contention that Internet access is creating congestion on the public switched network. If the Commission believes that this claim has any merit, then it seems unreasonable to implement a proposal that penalizes parties that move off the public switched network to satisfy this data communications requirement, thereby helping to relieve that congestion. *See, for example, Access Charge Reform NPRM* at ¶ 313 [Internet usage NOI].

<sup>7/</sup> *Price Cap Performance Review for Local Exchange Carriers, Treatment of Operator Services Under Price Cap Regulation, Revisions to Price Cap Rules for AT&T*, CC Docket No. 94-1, CC Docket No. 93-124, CC Docket No. 93-197, Second Further

Certainly consumer benefits, including “new and better technologies, new applications for existing technologies, and most importantly . . . lower consumer price,” were anticipated as a result of the enactment of the Telecommunications Act of 1996.<sup>8/</sup> Imposing a PICC on special access lines, however, thwarts the attainment of these anticipated benefits. A collateral concern is that the ILECs may next argue that the special access PICC will encourage migration to CLEC offerings and, that, in order to deter stranded ILEC investment, CLECs must collect a special access PICC. This is among the absurd consequences that could well emanate from a flawed policy decision to impose a PICC on special access offerings.

Moreover, attempting to manipulate customer service selections by imposing surcharges unrelated to the cost of service constitutes a form of regulatory micro-management that contravenes the deregulatory policies of the Act. It is a throwback to rate-of-return regulation employed in traditional cost-based ratemaking, despite the Act’s unequivocal rejection of these regulatory

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Notice of Proposed Rulemaking in CC Docket No. 94-1, Further Notice of Proposed Rulemaking in CC Docket No. 93-124, and Second Further Notice of Proposed Rulemaking in CC Docket No. 93-197, 11 FCC Rcd 858 (1995) (*Price Cap Second FNPRM*) at ¶ 29 (emphasis added).

<sup>8/</sup> 142 Cong. Rec. H1149 (Feb. 1, 1996) (statement of Rep. Fields), cited in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182 (rel. Apr. 19, 1996) at fn. 5.

approaches and the Commission's longstanding rejection of rate-of-return regulation.<sup>2/</sup>

The Commission's insistence on revenue neutrality for price cap LECs cannot be reconciled with ensuring some consumer benefits during the transition to a competitive environment. As the PICC demonstrates, cost recovery mechanisms established to ensure that LECs continue to obtain the same overall level of revenues merely shift the burden from one group of customers (interexchange carriers) to another (end users). While this approach may result in a more economically sensible pricing *structure*, it ensures that rates remain inflated to recover the implicit (and some explicit) universal service subsidies built into current access rates, to the detriment of both consumer and competitor. Furthermore, as noted, a special access PICC deliberately moves the industry away from economically efficient prices, and is likely to rob the LEC of the incentive to achieve efficiency-related cost savings. Given that these results are at odds with long-standing Commission objectives and the policy framework established by the 1996 Act, the Commission should refrain from imposing a PICC on special access lines unless and until the LECs have demonstrated a shortfall in common line revenues which might support the imposition of this additional fee on end-users and which is not attributable to competitive entry.

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<sup>2/</sup> See, for example, 47 U.S.C. §252(d)(1)(A)(i) and 47 U.S.C. §254(e).

**IV. ANY SPECIAL ACCESS PICC MUST BE IMPOSED IN LIMITED CIRCUMSTANCES AND, AT A MINIMUM, EXISTING SPECIAL ACCESS SERVICE ARRANGEMENTS SHOULD BE EXEMPT FROM THE PICC**

Because the Commission's proposal is intended to deter migration from interstate switched access services, the special access PICC - if adopted - should be applied only to the Commission's designated target group: multi-line business line customers who find it cost-effective to shift to special access services to avoid paying higher SLCs and new PICCs applicable to their current switched access service.

Clearly excluded from this narrowly-defined group are end users with existing special access service arrangements. By definition customers with these arrangements cannot take the action which the Commission intends to deter - migrating to special access services as a result of the imposition of the new PICC and the increased SLC. Similarly, customers who have not previously purchased telecommunications services at a given location should not be subject to a special access PICC; these new telecommunications customers are not shifting traffic from switched access. These customers are not making the telecommunications services purchase decision which the Commission wishes to discourage.

Imposing a PICC in these instances serves only to enrich the incumbent local exchange carrier at the expense of the end-user.

Additionally, the PICC should not be applied to any business customer who purchases special access services to meet high-speed data transmission requirements. Increasingly, customers purchase high capacity special access services to establish high speed telecommunications arrangements, such as wide area networks, to support distributed computing environments. WAN traffic cannot as a practical matter be routed over local business trunks. The bandwidth is not sufficient and circuit switching is not suitable for high speed data. Moreover, many companies are looking to dedicated access services to implement high speed Internet access for their organizations. There is little, if any, cross elasticity between dial-up circuits and dedicated access utilized for high speed Internet access. Similar to existing and new special access customers, purchasers of special access services used to support data communications services are not part of the Commission's target group. A PICC on these customers is nothing more than a tax, the proceeds of which inure only to the benefit of the incumbent LEC and its shareholders.

**V. TAXING SPECIAL ACCESS TO GENERATE COMMON LINE REVENUES UNDERMINES EMERGING COMPETITIVE ALTERNATIVES**

Although the Commission tentatively concludes that "we should permit price cap LECs to assess a PICC on special access lines to recover revenues of the common line basket," the FNPRM proposes no specific methodology for

assessing a “per line” PICC on special access customers.<sup>10/</sup> The single sentence inviting comment on the assessment issue refers to “special access connections,” rather than “special access lines,” suggesting that the Commission recognizes that the “per line” approach used to impose new PICCs on multi-line business line customers is unworkable in the context of special access services.<sup>11/</sup>

Purchases of special access capacity are not readily translatable into line equivalents. Customer premises equipment and the particular communications requirements determine the manner in which special access is used (multiplexed). Assessing a PICC or PICC multiples on these circuits is not simply bad economics, it cannot be applied in a systematic, administratively manageable fashion.

Competitive ramifications further complicate any assessment methodology. Special access is used as a component in increasingly well-received competitive local exchange offerings of at least one major interexchange carrier. The imposition of a new fee unrelated to the cost of providing special access service raises the price of competitive local exchange offerings. While these new services may be selected for reasons other than price, narrowing or eliminating the

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<sup>10/</sup> *FNPRM* at ¶ 403.

<sup>11/</sup> “We also seek comment on how special access connections should be counted for purposes of assessing a ‘per line’ PICC.” *FNPRM* at ¶ 405.

price differential surely diminishes the attractiveness of the alternative to the end user, to the detriment of both users and LEC competitors, and undermines the pro-competitive goals of the Telecommunications Act of 1996.

The assessment of a PICC on special access service might be doable if the assessment bore some relation to cost. However, it bears no relation to the cost of special access services, as the Commission acknowledges. Though described as a subsidy or cost recovery mechanism (intended to recover revenues for the price cap LECs' common line basket), it is fundamentally a tax to be assessed on special access customers to deter migration. Such migration, it is feared, will undermine efforts to attain the universal service goal of "affordable" telecommunications service for the general public, as provided under Section 254 of the 1996 Act.

In furtherance of "affordable" service the Commission retained the current SLC cap for residential and single-line business customers, with revenue shortfalls to be recovered, in part, through the new PICC.<sup>12/</sup> Because it fears that "PICCs for all remaining switched access lines will necessarily increase to make up for the loss of revenue" that is attributable to the assumed migration by large

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<sup>12/</sup> "The \$3.50 SLC ceiling for primary residential and single-line business customers prevents most incumbent LECs from recovering, through end-user charges, all of the common line revenues permitted under our price cap rules. To the extent that common line revenues are not recovered through SLCs, incumbent LECs will be allowed to recover these revenues through a PICC." *Access Charge Reform Order* at ¶ 91.

business customers to special access services, the Commission proposes a special access PICC to discourage such migration. The fact remains the PICC on special access services is a tax. As the courts have admonished the Commission in the past, taxing authority is reserved to Congress:

The lawmaker may, in light of the 'public policy or interest served,' make the assessment heavy if the lawmaker wants to discourage the activity; or it may make the levy slight if a bounty is to be bestowed; or the lawmaker may make a substantial levy to keep entrepreneurs from exploiting a semipublic cause for their own personal aggrandizement. *Such assessments are in the nature of "taxes" which under our constitutional regime are traditionally levied by Congress.*<sup>13/</sup>

As an exercise of taxing authority, it is impermissible and unconstitutional under Article I, Section 8. Absent the requisite legal foundation, the Commission should not adopt the proposal.

**WHEREFORE, PREMISES CONSIDERED,** the American Petroleum

Institute respectfully requests the Commission to reject the proposal to allow

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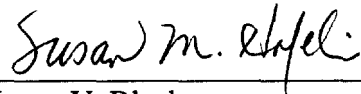
<sup>13/</sup> *National Cable Television Association, Inc. v. United States*, 415 U.S. 336, 340, 94 S.Ct. 1146, 1149 (1974) (footnote omitted; emphasis added). *See also Helvering v. Davis*, 301 U.S. 619, 645, 57 S.Ct. 904, 910 (1937). "[When money is to be spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress.]"



*Comments of API*  
*June 26, 1997*

incumbent local exchange carriers to impose PICCs on special access lines,  
consistent with the views expressed herein.

**AMERICAN PETROLEUM INSTITUTE**



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